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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

JURISDICTION: Zoning Powers

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 109 S. Ct. 2994 (1989), Brendale, a part-Indian non-tribal member owned land in the "closed" or restricted area of the Yakima Reservation through inheritance. The land in this area of the reservation was for many years inalienable to non-Indians, and it was comprised almost exclusively of trust lands. Wilkerson, a non-Indian, owned land in a "checkerboard" area of the reservation which was not restricted to Indian ownership. About half the land in the "open" area was fee land and the other half was comprised of trust lands.

The Court addressed whether the Yakima Indian Nation has the authority to zone land owned by non-Indians in the "closed" and "checkerboard" areas of their reservation. The Court held the Yakima Indian Nation retained the authority to zone lands owned by non-Indians in the "closed" area of their reservation (Brendale) but not in "checkerboard" area (Wilkinson).

There was no majority opinion. Three opinions were written by the Court. Four justices (White, joined by Rehnquist, Scalia, and Kennedy) were of the opinion that the Yakima Indian Nation did not retain any authority to zone non-Indian lands within their reservation; while three justices (Blackmun, joined by Brennan and Marshall) were of the opinion that the Yakima Indian Nation retained the authority to zone virtually all reservation lands regardless of whether the land is presently owned by non Indians.

The dispositive opinion was written by Justice White, joined by Justice O'Connor. White opined that the Yakima Indian Nation possessed the power to zone non-Indian land where the tribe has the ability to define the "fundamental character" of the land as Indian lands. This is possible where fee land, owned by non-tribal members is small in relation to the total area in question. On the other hand, where the "fundamental character" of the land can not be defined because of extensive non-Indian fee ownership (the "checkerboard" area of the reservation), the Yakima Indian Nation lacks the power to zone the non-Indian portions.

The importance of *Brendale* is that it reveals not only how the Court views the Yakima Indian Nation's right to zone non-Indian reservation lands, but also that the present Court is likely to take a more constrictive view on Indian sovereignty in the future. It seems strange that the Court is taking a more constrictive view on Indian sovereignty issues when the Indian sovereignty pendulum appears to be swinging in the opposite direction in both the executive and legislative branches of our Federal government.

JURISDICTION: Taxation

In *Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698 (1989), the Court upheld the finding of the New Mexico Court of Appeals that the state may validly impose severance taxes on the same on-reservation production of oil and gas by non-Indian lessees as is subject to the Tribe's own severance tax.

Pursuant to authority granted by the Indian Mineral Leasing Act of 1938 (1938 Act)[1], the Jicarilla Apache Tribe (the Tribe) leased lands on its New Mexico reservation to appellant Cotton Petroleum Corp. (Cotton), a non-Indian company, for the production of oil and gas. Cotton's on-reservation production is subject to both a 6 percent tribal severance tax and appellee state's 8 percent severance taxes, which applies to all producers throughout the state. Cotton brought an action in New Mexico state district court under the commerce clause of the federal Constitution, contending that the state taxes were invalid because the amount of state severance tax imposed by New Mexico on reservation activity far exceeded the value of services that the state provided in relation to such activity. The Tribe filed a brief amicus curiae arguing that a decision upholding the state taxes would substantially interfere with the tribe's ability to raise its own tax rates and would diminish the desirability of on-reservation leases.

The Court invited the parties to brief and argue, in addition to the issues enumerated above, whether the commerce clause requires a tribe to be treated as a "state" for purposes of determining whether a state tax on nontribal activities conducted on a reservation must be apportioned to account for taxes the tribe imposed on the same activity.

The Court's reasoning on each issue was as follows;

(1) Under the Supreme Court's modern decisions, on-reservation oil and gas production by non-Indian lessees is subject to

1. 25 U.S.C. §§ 396a-396g (1982).

nondiscriminatory state taxation unless Congress has expressly or impliedly acted to preempt the state taxes.

(2) The state taxes in question are not preempted by federal law, even when it is given the most generous construction under the relevant preemption test, which is flexible and sensitive to the particular facts and legislation involved and requires a particularized examination of the relevant state, federal, and tribal interests, including tribal sovereignty and independence.

The 1938 Act neither expressly permits nor precludes state taxation, but simply authorizes the leasing for mining purposes of Indian lands.

Moreover, the Act's legislative history sheds little light on congressional intent. The statement therein that the preexisting law was inadequate to give Indians the greatest return for their property does not embody a broad congressional policy of maximizing tribes' revenues without regard to competing state interests, but simply suggests that Congress sought to remove disadvantages in mineral leasing on Indian lands that were not present with respect to public land, which were, at the time, subject to state taxation.

The fact that the 1938 Act's statutory predecessor expressly waived immunity from state taxation of oil and gas lessees on reservations demonstrates that there is no history of tribal independence from such taxation, while the 1938 Act's omission of that waiver simply reflects congressional recognition that the Supreme Court's intervening decisions had repudiated the preexisting doctrine of intergovernmental tax immunity, under which such state taxation was barred absent express congressional authorization.

White Mountain Apache Tribe v. Bracker[2], and *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*[3], are distinguished on the ground that, here, the state provides substantial services to the tribe and Cotton that justify the tax; the tax imposes no economic burden on the tribe; and federal and tribal regulation is not exclusive, since the state regulates the spacing and mechanical integrity of on-reservation wells.

(3) There is no merit to Cotton's contention that the state's severance taxes—insofar as they are imposed without allocation or apportionment on top of tribal taxes—impose an unlawful multiple tax burden on interstate commerce. The fact that the state and tribe tax the same activity is not dispositive, since each

2. 448 U.S. 136 (1980).
3. 458 U.S. 832 (1982).

of those entities has taxing jurisdiction over the non-Indian wells by virtue of the taxation of Cotton's leases entirely on reservation lands within a single state.

The fact that the total tax burden on Cotton is greater than the burden on off-reservation producers is also not determinative, since neither taxing jurisdiction's tax is discriminatory, and the burdensome consequences are entirely attributable to the fact of concurrent jurisdiction.

The argument that the state taxes generate revenues that far exceed the value of the state's on-reservation services is also rejected. Moreover, there is no constitutional requirement that benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the taxpayer's community—must equal the amount of its tax obligations.

(4) The express language, distinct applications, and judicial interpretation of the interstate commerce and Indian commerce clauses establish that Indian tribes may not be treated as "states" for tax apportionment purposes.

INDIAN CHILD WELFARE

In *Mississippi Bank of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597 (1989), the Court held that the domicile of Indian children for purposes of the Indian Child Welfare Act[1] (ICWA) is the same as the domicile of the parents and that the state court was, therefore, without jurisdiction in this matter.

The cases involved the status of twin illegitimate babies, whose parents were enrolled members of appellant tribe and residents and domiciliaries of its reservation, in Neshoba County, Mississippi. After the twins' births in Harrison County, some 200 miles from the reservation, and their parents' execution of consent-to-adoption forms, they were adopted in that county's chancery court by the appellees Holyfield, who were non-Indian.

The chancery court subsequently overruled appellant tribe's motion to vacate the adoption decree, which was based on the assertion that the ICWA vested exclusive jurisdiction in appellant's tribal court. The Supreme Court of Mississippi affirmed, holding that the twins were not "domiciled" on the reservation under state law, in light of the chancery court's findings (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents, who went to some efforts to see that they were born outside the reservation

1. 25 U.S.C. §§ 1901-1923 (1982).

and promptly arranged for their adoption. Therefore, the court said, the twins' domicile was in Harrison County, and the chancery court properly exercised jurisdiction over the adoption proceedings.

The Court addressed the definition of the word "domiciled" as it is used in the ICWA and at the time at which domicile is determined.

The Court reasoned that although the ICWA does not define "domicile," Congress clearly intended a uniform federal law of domicile for the ICWA and did not consider the definition of the word to be a matter of state law. The ICWA's purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. In fact, the statutory congressional findings demonstrate that Congress perceived the states and their courts as partly responsible for the child separation problem it intended to correct. Thus, it is most improbable that Congress would have intended to make the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law. Moreover, Congress could hardly have intended a definition of "domicile," whereby different rules could apply from time to time to the same Indian child, simply as a result of being moved across state lines.

The Court found the generally accepted meaning of the term "domicile" applies under the ICWA, to the extent it is not inconsistent with the objectives of the statute. In the absence of a statutory definition, it is generally assumed that the legislative purpose is expressed by the ordinary meaning of the word used, in light of the statute's objective and policy. Well-settled principles provided that the domicile of minors, who generally are legally incapable of forming the requisite intent to establish domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children. Thus, since the domicile of the twins' mother (as well as the father) has been, at all relevant times, on appellant's reservation, the twins were domiciled there even though they have never been there. This result is not altered by the fact that they were "voluntarily surrendered" for adoption. Congress enacted the ICWA because of concerns going beyond the wishes of the individual parents, finding that the removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has a damaging social and psychological impact on many individual Indian children. These concerns demonstrate that Congress could not have intended to enact a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdic-

tional scheme simply by giving birth and placing the child for adoption off the reservation.

In *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989), the Eighth Circuit held that the district court has federal question jurisdiction to determine whether the tribe has the power to compel a non-Indian to submit to the civil jurisdiction of the tribal court.

In a child custody proceeding involving the orders of two state courts and the Oglala Sioux Tribal Court, at issue is the tribal court's exclusive subject matter jurisdiction under the ICWA, the petitioner's right to due process under the Indian Civil Rights Act[2] and the Parental Kidnapping Prevention Act.[3] The district court held that the petitioner had no right to relief under either the Parental Kidnapping Prevention Act or the Indian Civil Rights Act, and that the ICWA is inapplicable to child custody proceedings between divorced parents, and thus is inapplicable to the petitioner's suit. The district court also held that the tribal court had no personal jurisdiction over the petitioner, and thus had no authority to adjudicate the custody dispute involving his children. The tribal court appeals arguing that the district court erred in holding that the tribal court had no jurisdiction over the custody dispute.

In addition to holding that the district court has federal question jurisdiction, the Eighth Circuit also affirmed the ruling of the district court that the petitioner has no direct federal cause of action under the Parental Kidnapping Prevention Act, and the ICWA does not apply to the case. The court however disagreed with the district court's finding that section 1302(8) of the Indian Civil Rights Act does not give the petitioner a federal cause of action. While the court finds that the habeas corpus petition is an appropriate means of securing federal court jurisdiction, the appeal court reverses the district court's finding that the tribal court lacked jurisdiction over nonmembers absent their consent, on the grounds that the petitioner failed to exhaust the jurisdictional dispute in tribal court.

In *Eastern Band of Cherokee Indians v. Larch*, 872 F.2d 66 (4th Cir. 1989), the Eastern Band of Cherokee Indians and Frederick Larch, a member of the tribe, appeal from the district court's denial of the petition for a writ of habeas corpus, seeking the return of Larch's two children, enrolled members of the Cherokee Tribe, who have been removed from the Cherokee

2. 25 U.S.C. §§ 1301-1303 (1982).
3. 28 U.S.C. § 1738A (1982).

Reservation pursuant to a North Carolina state court's custody order. The Larches obtained a divorce in North Carolina state court and the court awarded custody to the mother. Four years later, the father obtained an order from the Cherokee Indian Court granting him custody of the two children and he brought the children from his former wife's residence to live with him on the Cherokee Reservation. The mother then sought enforcement of the 1983 state court custody decree. The North Carolina state court issued an immediate custody order, modifying its 1983 decree by giving immediate sole custody of the children to the mother. The district court dismissed the petition on the grounds that (1) it lacked jurisdiction, and (2) the tribe had failed to state a cause of action.

The Fourth Circuit finds that the district court had jurisdiction under 28 U.S.C. Section 1362 to determine the scope of the Cherokee Tribal Court's jurisdiction. The appeals court holds that an Indian tribe is a "state" as defined in Section 1738A(b)(8) of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. Section 1738A, and thus that the Eastern Band of Cherokee Indians is entitled to the Act's benefits and must comply with the Act's obligations to honor the custody decree of a state court, but finds that there is no private cause of action under PKPA to sustain the court's jurisdiction to choose between competing custody orders of a state and tribal court, and that the Cherokee Tribe's reliance on the provisions of the ICWA, 25 U.S.C. Sections 1901-1963, fails to state a claim upon which relief can be granted, as the ICWA does not apply to child custody matters arising out of a divorce proceeding.

JURISDICTION: Federal Question

In *Oklahoma Tax Commission v. Graham*, 109 S. Ct. 1519 (1989), the Court held that the well-pleaded complaint rule defeated federal court jurisdiction in this matter.

This case involves an attempt by the state of Oklahoma to tax cigarette sales and bingo revenues of a tribal enterprise of the Chicaksaw Nation.

The Tenth Circuit affirmed the decision of the U.S. District Court for the Eastern District of Oklahoma, which had dismissed the case on tribal sovereign immunity grounds. The Tenth Circuit also held that removal to federal court was proper because, even though the state's complaint facially had raised only state law questions, the "implicit federal question" of tribal immunity was involved. The U.S. Supreme Court vacated the Tenth Circuit's

decision and remanded the case for reconsideration in light of the Supreme Court's discussion of removal of jurisdiction and the well-pleaded complaint rule in *Caterpillar Inc. v. Williams*[1], On remand, the Tenth Circuit again held that removal and dismissal were proper. The U.S. Supreme Court granted cert a second time.

The Court held that under *Caterpillar*[2], the well-pleaded complaint rule defeats federal question jurisdiction and the case was improperly removed from the state courts. The Court, therefore, reversed the Tenth Circuit and expressed no opinion on the issue of tribal immunity, which it deemed not to be properly before the federal courts.

TRIBAL COURTS

In *Hodel v. Muscogee (Creek) Nation*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 795 (1989), the court determined that 1936 Oklahoma Indian Welfare Act repealed the provision at section 28 of the Curtis Act which abolished the tribal courts of the Creek Nation in Oklahoma, and thereby the Creek Nation is authorized to establish tribal courts having general civil criminal jurisdiction over cases involving tribal members.

Although 1936 Oklahoma Indian Welfare Act did not expressly repeal section 28 of the Curtis Act which abolished tribal courts, it conferred power upon Indian tribes to adopt constitution, which may reasonably be read to include power to create courts with general civil and criminal jurisdiction, and if the OIWA can be construed in favor of tribe, it must be so construed.

1. 482 U.S. 386 (1987).
2. *Id.*

A PROPOSED AMENDMENT TO THE INDIAN CIVIL RIGHTS ACT

Set forth below is a bill introduced in the Senate by Senator Hatch of Utah. If enacted, this bill will severely limit tribal court jurisdiction:

101st Congress
1st Session
S. 517

To provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes.

IN THE SENATE OF THE UNITED STATES

March 6 (legislative day, January 3), 1989

MR. HATCH introduced the following bill: which was read twice and referred to the

Committee on the Judiciary

A BILL

To provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Civil Rights Act Amendments of 1989."

Sec. 2. Title II of the Civil Rights Act of 1968 (Public Law 90-284, 25 U.S.C. 1301 et seq.), commonly called the Indian Civil Rights Act or the Indian Bill of Rights, is amended by adding at the end thereof the following new section:

Sec. 204. (a) Compliance with Section 202. — Federal district courts shall have jurisdiction of civil rights actions alleging a failure to comply with rights secured by this Act. Sovereign immunity shall not constitute a defense to such an action.

b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive, or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.

(c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that

(1) the tribal court was not fully independent from the tribal legislative or executive authority;
(2) the tribal court was not authorized to or did not finally determine matters of law and fact;
(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive, or other equitable relief, to interpose a defense of immunity;
(4) the tribal court failed to resolve the merits of the factual dispute;
(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;
(6) the tribal court did not adequately develop material facts;
(7) the tribal court failed to provide a full, fair, and adequate hearing; or
(8) the factual determinations of the tribal court are not fairly supported by the record, in which event the district court shall conduct a de novo review of the allegations contained in the complaint.
(d) In any civil action brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal court of tribal laws and customs.